RECORD AND BRIEFS

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Nos. 15-1503 & 15-1504

In the Supreme Court of the United States

CHARLES S. TURNER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

RUSSELL L. OVERTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI
TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR FORMER PROSECUTORS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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BRIEF FOR FORMER PROSECUTORS AS AMICI CURIAE SUPPORTING PETITIONERS

INTEREST OF AMICI CURIAE

Amici are 34 former federal and state prosecutors, including former attorneys general, who maintain an intent interest in the fair and effective administration of the criminal justice system.[1] Specifically, each of the amici supports the bedrock principle that a prosecutor's duty is to seek justice, not merely to convict. *Brady* v. *Maryland*, 373 U.S. 83, 87-88 (1963). Disclosure of all material and exculpatory evidence to the defense is fundamental to that duty. As this Court explained in *Brady*, the axiom underlying this prosecutorial responsibility is the "avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Id.* at 87 (citing *Mooney* v. *Holohan*, 294 U.S. 103 (1935)). Accordingly, this Court has long held that the "suppression

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[1] No counsel for a party authored this brief, in whole or in part, and no person other than amici or their counsel contributed any money to fund its preparation or submission. Counsel for amici provided timely notice of amici's intent to file this brief, and the parties have consented. A list of amici is appended hereto as Appendix A.

by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The case at bar provides a textbook lesson in the importance of the *Brady* rule, especially in present times when the fairness and integrity of law enforcement's conduct and policies are under intense scrutiny and the public's confidence in the criminal justice system is threatened. Amici thus submit that it is vitally important that this Court reverse the judgment of the Court of Appeals and reaffirm *Brady* and the prosecutor's duty to adhere to its requirements without qualification or reservation.

SUMMARY OF ARGUMENT

From amici's many combined years of prosecutorial and supervisory experience, they appreciate that some *Brady* cases raise close questions. This, however, is not one of them. To the contrary, this case presents precisely the type of egregious evidence suppression that this Court has prohibited. The District of Columbia Court of Appeals' decision, which found credible eyewitness evidence of an alternative perpetrator, who had a record of similar crimes, near the crime scene to be not material under *Brady*—in an admittedly weak case—violates petitioners' right to a fair trial and undermines the public's confidence in the criminal justice system.

In 1985, the seven petitioners were convicted of the robbery, sodomy and murder of Catherine Fuller in Washington, D.C. The prosecution's theory at trial was that Mrs. Fuller had been violently attacked and murdered by a large group of young men. Petitioners' convictions rested primarily on the conflicting,

including self-contradictory, and ever-changing testimony of teenagers who suffered from substantial credibility problems. The objective physical evidence not only failed to tie any of the petitioners to the crime, but undercut the prosecution's large group attack theory. As candidly acknowledged by the lead prosecutor, the case against the petitioners—even without the substantial exculpatory evidence that was suppressed here—was "[n]ot a good one," and "easily could have gone the other way." C.A. App. A1734, A1751. In fact, the jury deliberated for seven days prior to convicting six defendants, acquitting two others, and reporting that they were deadlocked as to defendants Christopher Turner and Russell Overton. No. 15-1503 Pet. App. 10a-11a. Only after being instructed by the court to continue to deliberate, and after doing so for an additional two days, did the jury render a guilty verdict as to those two. *Id.* at 11a.

Years after the trial, it came to light that the prosecution had failed to disclose a plethora of evidence favorable to the defense, including, among many other things, six eyewitness accounts that undercut the government's large group attack theory. Prior to the trial, the prosecution had only disclosed to the defense that the street vendor who had found Mrs. Fuller's body (Mr. Freeman) had observed two men near the crime scene, and one of them "appeared to be concealing an object under his coat." Pet. App. 17a. Both men fled when the police arrived. *Ibid.* Recognizing the import of the identity of those men, the defense made a request during the trial for their identities. J.A. 62-64. But the prosecutors refused to disclose their names, notwithstanding that a known "violent criminal prone to assaulting and robbing vulnerable women in the area" where Mrs. Fuller was mur-

dered, James McMillan, had been specifically identified as being one of them. Pet. App. 32a.

Unbeknownst to the defense, the government also had amassed considerable other evidence suggesting that McMillan might have been responsible for the murder, including the statements of two *additional* witnesses who confirmed that McMillan was in the alley where Mrs. Fuller's body was found. One of those witnesses further confirmed that McMillan was acting "suspicious[ly]" and had "something under his coat." Pet. App. 17a-18a. The defense was never made aware that McMillan was a suspect, or even that he had been linked to the case in any way. Making matters worse, in addition to the evidence about McMillan, the government also withheld significant other evidence suggesting that petitioners had not committed the murder, including statements by three *other* witnesses who reported that they did not see any group of individuals in the alley around the estimated time of Mrs. Fuller's death, and evidence further impeaching the government's witnesses. *Id.* at 31a. Despite the suppression of this evidence, the lead prosecutor falsely advised the jury in his closing statement that, "[a]fter an exhaustive and intense police investigation, the only witnesses who came forward or were found, you have heard from." J.A. 239.

Notwithstanding the plain import of the suppressed evidence in this admittedly weak case, the Court of Appeals concluded that the withheld evidence in its entirety was not "material" under *Brady*. That decision represents a significant departure from *Brady* and its progeny. In *United States* v. *Agurs*, this Court expressly found that "obviously exculpatory" evidence must be disclosed under *Brady* as a matter of "elementary fairness," and that prosecutors

must be faithful to their duty that "justice shall be done." 427 U.S. 97, 107, 110-11 (1976). Indeed, amici are not aware of a single decision that has found undisclosed eyewitness identification of a plausible alternative perpetrator near the crime scene immaterial under *Brady* where there was not also substantial physical evidence linking the defendant to the crime. "[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Id.* at 113.

Here, the Court of Appeals reasoned that the suppressed evidence could only be material if it gave "the jury a basis on which to doubt the government's *entire* case," given the evidence went to the "basic structure of how the crime occurred." Pet. App. 54a (emphasis added). Even putting aside the basic refutation that this crucial suppressed evidence went to the very heart of the government's entire case, this new standard impermissibly undermines *Brady*. The Court of Appeals expressly acknowledged that its standard made the "burden on appellants to show materiality quite difficult to overcome." *Ibid.* But this Court has consistently made clear that to prevail on a *Brady* claim, petitioners "need *not* show that they 'more likely than not' would have been acquitted had the new evidence been admitted." *Wearry* v. *Cain*, 136 S. Ct. 1002, 1006 (2016) (quoting *Smith* v. *Cain*, 565 U.S. 73, 75 (2012)). Rather, petitioners "must show only that the new evidence is sufficient to 'undermine confidence' in the verdict." *Wearry*, 136 S. Ct. at 1006. Plainly, that standard can be met here.

The Court of Appeals' circumscribed *Brady* analysis loses sight of the fundamental maxim that society only wins "when criminal trials are fair," and "our

system of the administration of justice suffers when any accused is treated unfairly." *Brady*, 373 U.S. at 87. To ensure that *Brady* protections remain a pillar of our criminal justice system, the Court of Appeals' decision should be reversed.

ARGUMENT

I. THE INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM DEPENDS ON FAITHFUL ADHERENCE TO *BRADY*.

A. The Criminal Justice System Cannot Function Fairly and Effectively Unless Prosecutors Comply with *Brady*.

Because prosecutors represent "the sovereignty," they are tasked with a special obligation: to seek justice, not just convictions, even when that duty requires foregoing a conviction to protect a defendant's constitutional rights. See *United States* v. *Bagley*, 473 U.S. 667, 675 n.6 (1985). Amici have had the honor of representing both the United States of America and state government over the course of many years and different political regimes. Having acted as "servants of the law," amici personally recognize that prosecutors serve not only their client, but the rule of law and justice itself. See *Berger* v. *United States*, 295 U.S. 78, 88 (1935) (As "servant[s] of the law," prosecutors safeguard "that guilt shall not escape nor innocence suffer."); *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999) (Prosecutors are not just advocates; they are servants of justice "in the search for truth in criminal trials."). Amici further appreciate that with this special obligation comes the duty to disclose exculpatory evidence to the defense. Indeed, since 1908, the American Bar Association has set standards of ethical

conduct, which have included the need for disclosure of exculpatory and mitigating evidence to criminal defendants.[2] And, over 50 years ago, this Court made clear that the obligation to turn over material, exculpatory information was a "right that the Constitution provides as part of its basic 'fair trial' guarantee." *United States* v. *Ruiz*, 536 U.S. 622, 628 (2002); see *Brady*, 373 U.S. at 87.

Underlying *Brady*'s disclosure requirement is the inherent imbalance of information that exists between prosecutors and defendants. In addition generally to having "greater financial and staff resources," the prosecution always has "inherent information-gathering advantages," including the ability to conduct an "investigation shortly after the crime has been committed when physical evidence is more likely to be found and when witnesses are more apt to remember events"; the ability to "force third persons to cooperate"; the ability "to search private areas and seize evidence" with probable cause; and access to the "vast amounts of information in government files." *Wardius* v. *Oregon*, 412 U.S. 470, 475 n.9 (1973); see also *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 813 (1987) (prosecution "has the power to employ the full machinery of the state in scrutinizing any given individual"); *United States* v. *Tavera*, 719 F.3d 705, 712 (6th Cir. 2013) (recognizing that the "superior prosecutorial investigatory appa-

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[2] In 1908, the ABA adopted the Canons of Professional Ethics, *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/Canons_Ethics.authcheckdam.pdf. The revised and updated Canons were published as the ABA Model Code of Professional Responsibility in 1969, and as the ABA Model Rules of Professional Conduct, first released in 1983.

ratus" has "the advantage of a large staff of investigators, prosecutors and grand jurors, as well as new technology"). Given this imbalance, a prosecutor's affirmative duty of disclosure directly embodies the prosecutor's ethical duty to seek justice, not just convictions. As this Court explained in *Brady*, a prosecutor that withholds material exculpatory evidence "helps shape a trial that bears heavily on the defendant" and "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice." 373 U.S. at 87-88.

B. The Failure to Comply with *Brady* Undermines Public Confidence in the Criminal Justice System.

In the half-century since *Brady* was decided, this Court has never wavered from its core principles. Yet, "nondisclosure of *Brady* material is still a perennial problem." *Tavera*, 719 F.3d at 708. Indeed, some believe that "*Brady* violations have reached epidemic proportions in recent years." *United States* v. *Olsen*, 737 F.3d 625, 631 (9th Cir. 2013) (denying rehearing en banc) (Kozinski, C.J., dissenting). Persistent, unchecked *Brady* violations threaten "the very integrity of the judicial system and public confidence in the system," which "depend on full disclosure of all the facts, within the framework of the rules of evidence." *United States* v. *Nixon*, 418 U.S. 683, 709 (1974). When *Brady* violations occur, they both infringe a defendant's constitutional right to due process and cast a long shadow of impropriety, and basic unfairness, over the justice system in the eyes of the public. See *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 571-72 (1980) ("To work effectively, it is important that society's criminal process satisfy the appearance

of justice . . . .") (internal citation and quotation omitted). Zealously protecting *Brady* is especially important at a time when—notwithstanding the dutiful service of most prosecutors—public confidence in the criminal justice system is declining. A recent national poll conducted by Harvard University's Institute of Politics found that nearly half of young adults lack confidence in the justice system. See Cara Tabachnick, *Poll: Young Americans Have "Little Confidence" in Justice System*, CBSNews.com (April 30, 2015); see also *Confidence in Institutions*, Gallup (June 5, 2016). Recent polls have also revealed a lack of faith in prosecutors specifically. For example, a 2013 poll conducted by the Center for Prosecutor Integrity found that 43 percent of Americans believed that prosecutorial misconduct is "widespread," while more than 70 percent believed it also goes undiscovered and unpunished. See Center for Prosecutor Integrity, *An Epidemic of Prosecutor Misconduct* (2013). Indeed, one cannot avoid frequent media coverage echoing claims of arrest and prosecution abuse by the government. Assiduous compliance with *Brady*'s strictures is both a constitutional mandate and an essential remedy to help dispel concerns about law enforcement abuse.

For these reasons, it is critical that courts not excuse *Brady* violations when they are discovered. This is not about motivation, but consequences. The recognition of *Brady* violations promotes justice in *all cases* by holding prosecutors accountable and reinforcing the importance of *Brady*'s disclosure obligations to the entire criminal justice system.

II. THIS CASE INVOLVES THE SUPPRESSION OF CREDIBLE ALTERNATIVE PERPETRATOR EVIDENCE THAT CONSTITUTES A TEXTBOOK *BRADY* VIOLATION.

Petitioners' brief (at 18-21) details the considerable amount of evidence that was suppressed by the prosecution in this case, including alternative perpetrator evidence suggesting that the prosecution wrongly identified the number and identity of the attackers. Such evidence is classic *Brady* material that should have been disclosed to the defense. The government's evidence suppression is particularly problematic because of the breadth and strength of the suppressed evidence and because the prosecution's case against petitioners was admittedly weak.

A. Alternative Perpetrator Evidence Is Quintessential *Brady* Material.

Eyewitness identification of an alternate perpetrator "is the type of exculpatory information that courts have long recognized as core *Brady* material, where the danger of a denial of due process of law is great." *Watkins* v. *Miller*, 92 F. Supp. 2d 824, 846 (S.D. Ind. 2000) (citing, *inter alia*, *United States ex rel. Meers* v. *Wilkins*, 326 F.2d 135, 138 (2d Cir. 1964) (Marshall, J.); see *Kyles* v. *Whitley*, 514 U.S. 419, 447-48 (1995) (evidence of key eyewitness's "affirmatively self-incriminating assertions"—supporting the theory of an alternative perpetrator—was material under *Brady*); accord *Williams* v. *Ryan*, 623 F.3d 1258, 1265 (9th Cir. 2010); *DiSimone* v. *Phillips*, 461 F.3d 181, 195 (2d Cir. 2006); *Mendez* v. *Artuz*, 303 F.3d 411, 415-17 (2d Cir. 2002) (per curium); *Clemmons* v. *Delo*, 124 F.3d 944, 949-52 (8th Cir. 1997); *United States* v. *Robinson*, 39 F.3d 1115, 1116-19 (10th Cir. 1994);

Cannon v. *Alabama*, 558 F.2d 1211, 1215-16 (5th Cir. 1977); *Floyd* v. *State*, 902 So.2d 775, 785-86 (Fla. 2005); *Harrington* v. *State*, 659 N.W.2d 509, 524-25 (Iowa 2003).

It is not hard to understand why. Credible evidence suggesting that someone other than the defendant committed the crime is among the most powerful evidence available to the defense. Indeed, it is difficult to imagine evidence that could be more helpful—and important to the administration of a fair trial—particularly where, as here, there is no physical evidence implicating any defendant and the alternative perpetrator was both identified by an eyewitness and had committed similar crimes. This is borne out by research, which has shown that alternative perpetrator evidence is often crucial to a defendant's ability to present a complete narrative. See Elizabeth R. Tenney et al., *Unpacking the Doubt in "Beyond a Reasonable Doubt": Plausible Alternative Stories Increase Not Guilty Verdicts*, 31 Basic & Applied Soc. Psychology 1 (2009) (the presentation of alternative perpetrator evidence increases the likelihood of acquittal); see also John H. Blume et al., *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense*, 44 Am. Crim. L. Rev. 1069 (2007) (narrative plays a key role in jurors' decision-making processes, and alternative perpetrator evidence is often necessary to present jurors with a "complete" narrative); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 Cardozo L. Rev. 519 (1991) (narrative plays a key role in jurors' decision-making processes).

In addition to laying a meaningful foundation for the possibility that someone else committed the crime,

see *Kyles*, 514 U.S. at 441-42, alternative perpetrator evidence can be used to uncover leads and various defense theories, see *Banks* v. *Reynolds*, 54 F.3d 1508, 1519 (10th Cir. 1995), question the certainty of prosecution witnesses on cross-examination, see *Kyles*, 514 U.S. at 441-45, and impeach the credibility of the prosecution's witnesses by presenting contradictory evidence, see *Jamison* v. *Collins*, 100 F. Supp. 2d 647, 695 (S.D. Ohio 2000), *aff'd*, 291 F.3d 380 (6th Cir. 2002). Evidence of alternative suspects also may allow the defense to attack the "reliability of the investigation" and the State's overall theory of the case. See *Kyles*, 514 U.S. at 446; *Trammell* v. *McKune*, 485 F.3d 546, 551 (10th Cir. 2007); *Mendez* v. *Artuz*, 303 F.3d 411, 416 (2d Cir. 2002) (per curiam).

Indeed, amici are not aware of a *single* decision that has held that undisclosed witness identification of a plausible perpetrator near the crime scene was not material under *Brady* unless there was also substantial physical evidence linking the defendant to the crime. See *Beuke* v. *Houk*, 537 F.3d 618, 635-36 (6th Cir. 2008) (fingerprint and forensic evidence of the defendant in the victim's car and linking the bullets removed from victim's body to defendant's gun constituted "substantial objective evidence of [defendant's] guilt"); see also *Madrid* v. *Wilson*, 590 F. App'x 773, 779 (10th Cir. 2014); *Grube* v. *State*, 995 P.2d 794, 799 (Idaho 2000).

B. The Government Suppressed Considerable And Credible Alternative Perpetrator Evidence And Other Evidence Undermining The Prosecution's Theory Of The Case.

The government suppressed considerable and credible evidence suggesting that uncharged others

were the ones actually responsible for Mrs. Fuller's murder. As stated above, the government failed to disclose that three witnesses had specifically identified McMillan as being in the alley near the garage where Mrs. Fuller's body was found. Two of those three witnesses specifically stated that McMillan was acting suspiciously and appeared to have something hidden under his coat. Pet. App. 10a, 17a. McMillan lived a few doors away from the alley where Mrs. Fuller was murdered. In that same vicinity, he had violently assaulted and robbed two other middle-aged women just three weeks after Mrs. Fuller's murder. Pet. App. 17a.[3] The credibility of these witnesses' suppressed accounts is underscored by the fact that the prosecution itself—unbeknownst to the defense—considered McMillan a suspect in the crime. *Id.* at 17a-18a. Indeed, if the prosecution is enabled to suppress such telling evidence, it is difficult to establish any limits on what a prosecutor can justify in the future.

The prosecution also withheld from the defense at least three *other* witness statements that further undercut the prosecution's large group attack theory. See Pet. App. 31a-32a. Those three witnesses walked through the alley around the estimated time of Mrs. Fuller's death and reported that they did not see any group of individuals. As recognized by the Court of

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[3] After petitioners' trial, McMillan was convicted of a "chillingly similar" sodomy-murder that took place in 1992 in an alley just three blocks from the alley where Mrs. Fuller's body was found. See Pet. Br. 49-50. The Court of Appeals noted that this subsequent murder could not, of course, have been admitted at the trial (Pet. App. 36a-37a), but that crime further demonstrates the egregious nature of the suppression here.

Appeals, if the attack on Mrs. Fuller was occurring when those three witnesses walked through the alley, "it could not have been committed by a large group of people." *Id.* at 32a. In addition, the government failed to disclose that in the course of its investigation another witness (Ammie Davis) had identified James Blue as the individual who committed the murder. *Id.* at 19a-20a. Blue had previously been arrested for armed robbery, rape and forcible sodomy. *Id.* at 19a. The government excused its failure to provide Ms. Davis's statement because it considered her account incredible; she was unavailable at trial because Blue murdered her shortly before it began. *Id.* at 20a-22a.

C. The Government's Evidence Suppression Is Particularly Inexcusable Because the Prosecution's Case Against Petitioners Was Admittedly Weak.

In this case, there was no physical evidence linking anyone to the crime. The weapon used to commit the assault and sodomy was never located. The medical examiner could not determine from Mrs. Fuller's injuries how many persons were involved in the assault. Pet. App. 4a. After conducting more than 400 interviews and facing public pressure to find the person or persons who committed this heinous crime, the government charged 13 young men. The government's theory that a large group of young men was responsible for the crime was based on the conflicting statements of a small subset of the 400 interviews, and was contrary to the objective physical evidence. At trial, the government's case against the petitioners was admittedly attenuated (Pet. App. 5a-8a), and centered on the conflicting and ever-changing testimony of two cooperating witnesses, who were both given reduced

sentences in exchange for their testimony against the other defendants. Many years later, both of the cooperating witnesses recanted.[4]

The prosecution also offered the testimony of four other witnesses who purported to see some (but not all) of the petitioners either participate in the attack, in the alley where the crime occurred, or cross the street to rob someone. As acknowledged by the Court of Appeals, the majority of those witnesses had substantial credibility problems. The government's witnesses—who were all teenagers at the time of the trial—included:

- Carrie Eleby and Linda Jacobs, who were both "PCP users" and claimed to have observed the crime together yet gave contradictory and ever-changing accounts of both their location and the crime. Pet. App. 6a. As acknowledged by the Court of Appeals, both witnesses "were impeached or contradicted by other testimony" and had "significant credibility problems," and the jury may have "disbelieved most of [Jacobs'] testimony." *Id.* at 6a, 46a.
- Melvin Montgomery, a drug dealer who acknowledged during his testimony that he had previously denied having knowledge of the crime. See Pet. Br. 14.
- Maurice Thomas, a 14-year-old boy who, similar to the other government witnesses, gave contradictory statements over time. Thomas purported to see the crime from nearly 150 feet

[4] The District of Columbia Superior Court did not find the recantations credible. Pet. App. 110a.

away and, according to the Court of Appeals, the jury "disbelieve[d]" Thomas at least in part. See Pet. App. 7a, 47a.[5]

Based on these deficiencies, it is not surprising that the lead trial attorney for the prosecution acknowledged that the case "was not a good one" and it "easily could have gone the other way." C.A. App. A1734, A1751. In sum, there is no reasonable possibility that this error of omission was harmless.

III. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH *BRADY* AND DOES NOT PROTECT DUE PROCESS.

As this Court reiterated just last year, suppressed evidence is material under *Brady* "when there is any reasonable likelihood that it could have affected the judgment of the jury." *Wearry* v. *Cain*, 136 S. Ct. at 1006 (internal citations and quotations omitted). A defendant "need not show that he 'more likely than not' would have been acquitted had the new evidence been admitted. *Ibid.* (quoting *Smith*, 565 U.S. at 75). Rather, he must demonstrate that the suppressed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. In determining whether suppressed evidence is material, a reviewing court must weigh the effect of the evidence,

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[5] The prosecution also relied on a witness (Kaye Porter) who claimed to have heard one of the petitioners confess to the crime; this witness was impeached with her grand jury testimony that the defendant denied any involvement in the crime. Pet. App. 8a n.4. Notably, that witness also acknowledged having previously lied to police that one of the cooperating witnesses had confessed to the crime, because Eleby had asked her to do so, but the prosecution failed to disclose that lie to the defense. *Id.* at 22a.

individually and cumulatively, in light of the record presented at trial. See, *e.g.*, *id.* at 435 & n.10; *Bagley*, 473 U.S. at 683. Although the Court of Appeals' decision recited these legal principles, its analysis departed from them, and created an effectively insurmountable *Brady* materiality threshold for the petitioners here.

A. The Court Of Appeals Improperly Speculated About The Credibility Of The Evidence.

Rather than focusing on the potential materiality of information that identified plausible alternative perpetrators and otherwise undermined the prosecution's group attack theory, the Court of Appeals presumptively determined that the jury would nevertheless credit the testimony of the government's witnesses. In doing so, the Court of Appeals ignored this Court's instruction that courts should refrain from undertaking this type of relative *Brady* materiality analysis that "emphasize[s] reasons a juror might disregard new evidence while ignoring reasons she might not." *Wearry*, 136 S. Ct. at 1006-07; see also *Smith*, 565 U.S. at 76 (rejecting *Brady* materiality arguments that focused on what "the jury could have disbelieved" without any showing that the jury actually "would have done so"); *Brady*, 373 U.S. at 88 ("We cannot put ourselves in the place of the jury and assume what their views would have been . . . .").

It is a fundamental canon of the American legal system that credibility determinations and the weight to accord evidence are questions for the fact finder—in this case, the jury. See, *e.g.*, *Jackson* v. *Denno*, 378 U.S. 368, 386 n.13 (1964) ("[Q]uestions of credibility, whether of a witness or a confession, are for the jury."); *Florez* v. *Cent. Intelligence Agency*, 829 F.3d

178, 184 (2d Cir. 2016). In conflict with this principle, the Court of Appeals repeatedly speculated, without basis, that the jury would have discounted the suppressed evidence in this case. For example, the Court of Appeals hypothesized:

- the fact that two eyewitnesses (Jackie Watts and Willie Luchie) heard nothing else and saw no signs of activity in the alley "*more likely* indicated that the assault was over and the assailants were gone" (Pet. App. 50a) (emphasis added);
- it was "*far more likely*, in our view, that the jury would have believed that Luchie was mistaken" that both of the garage doors were closed shortly before Mr. Freeman found one of them open or believed "that someone came upon the scene and opened the garage door" (*ibid.*) (emphasis added);
- the "jury *might have* suspected that McMillan arrived on the scene only after Watts and Luchie departed (but before Freeman arrived)" (*ibid.*) (emphasis added);
- even if the jury had heard from Watts and Luchie, "*we think* the jury . . . would have had no substantial reason to suspect McMillan as the sole perpetrator" (*id.* at 51a) (emphasis added); and
- "[i]t is not implausible that McMillan heard about the attack and decided to look out of curiosity; nor that he carried something away from the garage, explaining his suspicious behavior" (*ibid.*).

This last statement demonstrates vividly how far the Court of Appeals departed from *Brady*; the test is not whether the government's case is "not implausible," but rather, whether the suppressed evidence could plausibly lead to a different view.

The Court of Appeals' approach not only deprives the criminal trial of its place "as the chosen forum for ascertaining the truth about criminal accusations," *Kyles*, 514 U.S. at 440, but signals to prosecutors that they can operate on the basis that evidence is not material for purposes of *Brady*—and therefore need not be disclosed—so long as it can be rationalized as not necessarily requiring a jury to reverse its decision. What is more, such a standard promotes a self-effectuating cycle of evidence suppression because *Brady* violations are more likely to occur where evidence conflicts with the government's theory of the case. This approach threatens to turn *Brady*'s truth-seeking function on its head.

B. The Court Of Appeals Created An Impossibly High Materiality Threshold, Effectively Applying A "Sufficiency Of The Evidence" Test.

The Court of Appeals concluded that the suppressed evidence was not material because—based on the Court of Appeals' speculation of how the jury would have viewed the evidence—it did not "directly contradict[] the government's witnesses or show them to be lying," but put at issue the "basic structure of how the crime occurred" (*i.e.*, the prosecution's theory of a group attack versus a single or few perpetrator attack). Pet. App. 53a-54a. The Court of Appeals conceded that "[t]his makes the burden on appellants to show materiality quite difficult to overcome, because it requires a reasonable probability that the

withheld evidence . . . would have led the jury to doubt *virtually everything* that the government's eyewitnesses said about the crime." *Id.* at 54a (emphasis in original). The Court of Appeals minimized the materiality of the suppressed evidence regarding McMillan on the basis that the jury could have concluded that, even if he were a perpetrator, he was part of the convicted group. *Id.* at 53a. Of course, the jury could also have concluded that he alone, or perhaps with one or two accomplices, committed the murder, particularly as his two subsequent robberies were committed alone or with one other person. See Pet. App. 18a n.12.

The *Brady* materiality standard is far from that deployed by the Court of Appeals; it "is not a sufficiency of the evidence test." *Kyles*, 514 U.S. at 434; see *ibid.* ("a showing of materiality does not require demonstration by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal"). "One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435; see also *Wearry*, 136 S. Ct. at 1006 ("Evidence qualifies as material when there is *any reasonable likelihood* it could have affected the judgment of the jury.") (citations and internal quotation marks omitted) (emphasis added); *United States* v. *Smith*, 77 F.3d 511, 515 (D.C. Cir. 1996) ("*Kyles* rightly focuses attention [ ] on the potential impact the undisclosed evidence might have had on the fairness of the proceedings. Thus, the amount of addi-

tional evidence indicating guilt is not dispositive of our inquiry.").

In *Kyles*, the Court disagreed with the dissent for doing what the Court of Appeals did here, specifically "assum[ing] that [the defendant] must lose because there would still have been adequate evidence to convict even if the favorable evidence had been disclosed." 514 U.S. at 435 n.8. The *Kyles* Court emphasized that the suppressed evidence was still material under *Brady* even if it (i) would have left two prosecution witnesses "totally untouched," (ii) would not cause the jury to doubt *all* the eyewitnesses, and (iii) was "perfectly consistent" with the government's case. *Ibid.*; see also *Trammell* v. *McKune*, 485 F.3d 546, 551 (10th Cir. 2007) (overturning district court's holding that withheld evidence was not material because it did not "cast any doubt on the eyewitness identifications" and was "consistent with [defendant's] testimony"). Significantly, the Court found that the suppressed evidence in *Kyles* was material even though—in stark contrast to the case against petitioners here—there was significant forensic evidence (including the murder weapon) that connected the defendant to the crime. *Id.* at 427-28, 445. Moreover, in this case, the suppressed evidence was totally *inconsistent* with the government's case.

C. The Suppressed Evidence Undermines Confidence In The Jury's Verdict In This Close Case.

By focusing on whether the suppressed evidence "directly contradicted" all the government's witnesses, the Court of Appeals discounted the impact that the suppressed evidence would have had on the defense's strategy, particularly when considered in the

context of the entire record. See *Kyles*, 514 U.S. at 442-49 (detailing the ways in which the defense could have attacked the prosecution's case had the prosecution not suppressed the evidence in question); *Bagley*, 473 U.S. at 683 (reviewing court should consider the "adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case.").

For example, the Court of Appeals' conclusion that the jury would have found that "McMillan simply could have been another member of that group," Pet. App. 51a, ignores that the suppressed alternative perpetrator evidence here would have been powerful new ammunition for the defense to further attack the government witnesses' testimony regarding the identity and number of individuals who participated in the attack. As otherwise acknowledged by the Court of Appeals, the testimony of the two cooperating witnesses "differed on some important matters," including whether and how certain petitioners participated in the crime, and both had made "prior inconsistent statements" to the police and grand jury on those critical issues. *Id.* at 6a. In fact, the jury discredited the testimony of both the cooperating witnesses at least in part, given its acquittal of defendant Alphonso Harris, whom both cooperating witnesses had specifically identified as having participated in the attack. See *id.* at 47a; Pet. Br. 17. The defense's alternative theory would have provided a further basis for the jury to conclude that the government's witnesses had not actually observed the petitioners participate in the crime, as they claimed. The Court of Appeals' analysis also fails to consider that the witnesses who offered the suppressed alternative perpetrator evidence—in stark contrast to the government's wit-

nesses—had no apparent motivation to testify falsely. In the end, however, these were issues for the jury to weigh, not ones for the Court itself to prejudge.

Moreover, the reviewing court should have "an awareness of the difficulty of reconstructing in a post-trial proceeding the course the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response." *Bagley*, 473 U.S. at 683. There is no indication that the Court of Appeals had such an awareness here—even though the record reflects that not only was the defense misled, but the jury was misled given the lead prosecutor's false representation that the jury had heard from the "only witnesses who came forward or were found" during the "exhaustive and intense police investigation." Pet. Br. 45-46 (citing J.A. 239).

Considering the quality and quantity of the suppressed evidence in light of the entire record, the potential for the suppressed evidence to have affected the outcome of the trial is inescapable. The government's failure to disclose the evidence relating to McMillan—which was so credible that the government considered him a suspect—by itself is an egregious breach of the prosecution's *Brady* obligations. See *Kyles*, 514 U.S. at 441-54; *Youngblood* v. *West Virginia*, 547 U.S. 867, 870 (2006). Had McMillan's identity been disclosed to the defense, the defense would have possessed substantially more evidence to challenge the government's investigation and develop a theory that contradicted the one advanced by the prosecution. Indeed, the Court of Appeals acknowledged that the "physical (as opposed to the eyewitness) evidence of the attack adduced at trial arguably supported, or at least was not inconsistent with, a single-perpetrator theory, and there was some other evi-

dence at trial to corroborate it." Pet. App. 49a. Moreover, one of the government's own witnesses (the street vendor Mr. Freeman) would have provided further support to the theory that the crime was not committed by a large group of people, given he testified that "throughout his day . . . he never saw a large group of young people in the area." *Id.* at 49a n.79. That critical fact would have been further bolstered by the other suppressed evidence, including the statements of Willie Luchie, Ronald Murphy and Jackie Watts, who walked through the alley at the estimated time of Mrs. Fuller's death and heard groans coming from the garage, but did not observe any group. Pet. App. 50a. The withheld evidence would have given defendants a meaningful way to build on that evidence, and challenge the prosecution's large group attack theory with significant evidence.

The potential effect of the undisclosed evidence on the outcome of the trial becomes ever more readily apparent when viewed in light of the quality of the evidence presented by the government at trial. As stated by this Court, "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Agurs*, 427 U.S. at 113; see also *Robinson*, 39 F.3d at 1119 ("What might be considered insignificant evidence in a strong case might suffice to disturb an already questionable verdict."). Here, there was no physical evidence tying any perpetrator to the crime, which heightens the materiality of the suppressed evidence. *Castleberry* v. *Brigano*, 349 F.3d 286, 289-90 (6th Cir. 2003) (withheld evidence, including "witness accounts of suspicious persons in the vicinity" of the crime, was material where there was no physical or forensic evidence linking defendant to the crime);

Gantt v. *Roe*, 389 F.3d 908, 913 (9th Cir. 2004) (holding that newly discovered information is material when it undermines a conviction based upon little physical evidence). As stated above, the government's case rested on witnesses who had significant credibility problems. Indeed, the prosecution expressly acknowledged that the evidence against the petitioners was weak. Based on the record as a whole, it is painfully clear that the government's failure to turn over the suppressed evidence can "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

* * *

The Court of Appeals' circumscribed view of a prosecutor's duty to disclose alternative perpetrator evidence undermines *Brady* jurisprudence, and the truth-seeking process and principles of fairness on which it is based. It effectively excuses the prosecution's failure to disclose evidence in an admittedly close case even though that evidence would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense. It is far too easy for *Brady* violations to go unnoticed and never be discovered at all. When courts discover and acknowledge, but excuse, the suppression of exculpatory evidence of plain import to the defense, they endorse that conduct and erode the public's trust in our justice system. This is the quintessential case of evidence suppression; unless reversed, it makes *Brady* a "dead letter."

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

Respectfully submitted.

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